No. 14049.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PEOPLE OF THE STATE OF CALIFORNIA,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

SANTA MARGARITA MUTUAL WATER COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeals From the United States District Court for the Southern District of California, Southern Division.

CLOSING BRIEF OF AMICUS CURIAE.

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CLOSING BRIEF OF AMICUS CURIAE.

Introduction.

It is our opinion that Appellee's last brief is not so much a reply to *Amicus* as a restatement of its oral argument and a reply to the Brief of Appellants. The part dealing directly with *Amicus'* arguments raises, as to nearly every point discussed in our brief, the technical objection to the consideration of their merits by this Court because error had not been reserved or specified by Appellants. Appellants' Points on Which They Intend to Rely on Appeal are both numerous and comprehensive and cover every phase of the controversy.[1] If, in some instance, a narrow construction of those points would seem to preclude our contentions being formally before the Court, we urge, in view of the thousands of defendants

[1]R. 95.

awaiting trial and especially in view of Appellee's own statement that the intended purpose of these separate trials was to "alleviate the burden of the litigation upon the small users," that this Court apply a liberal construction to the specifications of error and ignore technicalities, in order to pass on the merits of the controversy and so avoid as far as possible further appeals to this Court based on misconceptions of the law by either party.

ARGUMENT.

I.

Replying to Appellee's General Arguments.

(a) Surplus "at the Present Time."

At several places in its brief (for example, at pp. 11-15 and 22-23), Appellee has reasserted the thesis, earlier advanced at oral argument, that this appeal is concerned with whether or not there is a surplus "at the present time" available for appropriation and that therefore surplus at some possible future time is of no significance. Taken literally, Appellee's argument would reduce the judgment to an idle declaration regarding a particular moment (a moment that is now in the past so far as this case is concerned). We assume, however, that Appellee's argument concerning the language "at the present time" was designed to limit the scope of the judgment not to a particular moment, but rather to a particular period of years, a period which happens to have been a dry one. This interpretation conflicts with the trial court's own explanation of the decision. In the opinion of December 9, 1952, the Court did not state that there was no surplus at that particular time;[2] instead the Court reviewed the

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[2]Marine Corps figures showed a waste to the ocean of 49,483 acre feet in the water year 1951-52, the last year covered by the evidence. [Ex. 44, Appx. "B" of Appellant's Op. Br.]

history of the stream and concluded (109 Fed. Supp. at 40-42) that the periodic high flows could not be made available by the physical solution offered by the Santa Margarita Mutual Water Company. The Court was considering the long-range proposal to store the recurring surplus flows; and apparently the conclusion that there was no surplus was intended as a determination applicable to any complete cycle of wet and dry years.

What Appellee is really trying to do is to explain away the patent conflict between (1) the judgment's declaration that there is no surplus and (2) the undisputed evidence of great waste to the ocean of approximately 75% of the total average resources of the River. The true explanation of this conflict is that the trial court rejected the proposed long-time storage as a physical solution. As Appellants have pointed out, the trial court in reality misinterpreted the suggested physical solution. However, the Court was under a duty to consider, on its own initiative, some other possible physical solution (*Rancho Santa Margarita v. Vail,* 11 Cal. 2d 501, 556, 559, 81 P. 2d 533, 561; *City of Lodi v. East Bay Municipal Utility Dist.,* 7 Cal. 2d 316, 341, 60 P. 2d 439, 450), a duty which the Court did not undertake.[3]

On page 13 of its brief Appellee has presented a table purporting to show that "at the present time" (that is, during the arbitrarily chosen dry period from 1946-47 through 1953-54) the average yield of the stream has been only 7,971 acre feet per year as contrasted with the decreed award to the United States of 11,000, 15,300 or

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[3]Since the trial of this case Congress has made available another physical solution by enacting Public Law 547, approved July 28, 1954, authorizing a dam for the joint use of the Navy and Fallbrook.

69,237 acre feet, whichever you may choose. What Appellee's table refers to as the yield of the stream is actually the waste to the ocean—the amount remaining after all withdrawals by the United States and other users.[4] The true yield of the stream would be the discharge to the ocean *plus* consumptive uses. Moreover, the table is misleading if used for the purpose of showing the amount of surplus, for the period chosen was a dry one. *Amicus* proposes to take water only when the flow is more than the amount currently being used by those with prior rights. To determine whether or not there is a surplus available for appropriators, therefore, a complete cycle of wet as well as dry years must be considered. Such an analysis reveals beyond question that there is a surplus. As a matter of fact, right in the middle of the dry period covered by Appellee's table, there was a year of very heavy runoff, a year in which an appropriator with adequate storage facilities could have recovered and conserved large quantities of water that wasted to the Pacific. Finally, Appellee's table assumes that Appellee will be able to take the flow up to the maximum of its decreed demand. The trial court itself, however, emphasized the erratic character of the Santa Margarita River, pointing out that the water frequently comes in sudden bursts.[5] Only by storage can such sudden flows be prevented from rushing unused to the ocean, and Appellee has no storage rights.[6]

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[4]The table is obviously based on the records of the Ysidora Gaging Station, brought up to date. Those records show flow to the ocean. [R. 495.]

[5]109 Fed. Supp. 28, 40-41.

[6]Appellee's claim of storage right is only for 4,300 acre feet in Lake O'Neill by presecription, but we assert that that claim has no legal justification.

(b) 11,000 or 15,300?

At pages 15-17, Appellee has once again advanced the claim that the decree grants to it not 11,000 acre feet of water per year but 15,300. Examination of Finding 67 (110 Fed. Supp. at 778-779) shows clearly that the present needed average of 11,000 acre feet therein referred to is the present needed average *at Camp Pendleton,* which obviously includes the agricultural and domestic uses historically made of the water in Lake O'Neill [see Finding 59, 110 Fed. Supp. at 777]. The fact that the *right* to store in Lake O'Neill is "in addition" to the other rights mentioned in paragraph 10 of the judgment does not mean that the water involved in that storage is an additional *use* right over and above the 11,000 acre feet already awarded to meet the Government's present needs. Appellants' Reply Brief (pp. 6-7) completely refutes the claim of Appellee that the planned training and recreational uses of Lake O'Neill have a proper bearing upon the question of surplus, and yet Appellee is content now merely to reassert its claim without discussing Appellants' answer to it.

(c) Flood Benefits.

At pages 17-21 of its brief, Appellee seeks to invoke a right to the flood flows of the Santa Margarita River for the purposes of repelling salt water intrusion into Pendleton Basin, recharging the basin, subirrigating the surface of the basin, and enriching and fertilizing the alluvial plain. Here again, Appellee in reality is attempting to account for the trial court's failure to recognize the surplus that obviously exists. Apparently, Appellee's theory is that what appears to be a tragic waste to the ocean is in reality a justified use of water because of slight benefits to Appellee which incidentally result.

Significantly, this claim in its latest form does not respond to the comprehensive answer to it which appears at pages 13-20 of Appellants' Reply Brief. Appellants there pointed out that these incidental benefits resulting from waste flows were not at all the theory upon which the trial court based its judgment—no award was made for any of them. Moreover, the trial court made no quantitative comparison of the amount of these incidental benefits in relation to the amount of waste; as Appellants correctly observed, the trial court could not determine the reasonableness of these uses without first determining the amount of water thereby consumed. We emphatically dispute Appellee's incredible assertion (p. 20) that the California cases "reveal" that the "sole criterion" in regard to flood water is whether the flood waters "benefit the land." On the contrary, at the heart of the present water law of California is the concept that waste must be avoided; the very decision upon which Appellee purports to rely (*Peabody v. City of Vallejo,* 2 Cal. 2d 351, 376, 40 P. 2d 486, 495) makes it clear that all uses must be reasonable as well as beneficial and that a riparian owner may not insist upon a large waste in order to obtain a small benefit. (See also *Town of Antioch v. Williams Irr. Dist.,* 188 Cal. 451, 461, 205 Pac. 688, 693.)

(d) The Water Available at Camp Pendleton.

At pages 24-26, Appellee reviews several factors bearing on the supply of water at Camp Pendleton. (1) The amount which is available at Camp Pendleton *for use under the Government's lawful rights* is not 12,500 acre feet. The trial court's finding that this amount is available to the Government is based on the acknowledged fact that the Government will have to construct and

operate a proposed "equalizing" reservoir to attain that figure—but the Government may not lawfully do so, as is pointed out later in this brief. (2) The Navy is to be complimented on its conservation practices, including use of sewage effluent. But the fact that the Navy's rights do not entitle it to all the water it would like to have does not give the Navy any greater rights. Necessity is not the measure of one's rights. In view of the prohibitions upon artificial storage by Appellee, as a riparian, there certainly exists a surplus over Appellee's rights even in the absence of any surplus over Appellee's needs. (3) Finding 18, which states that considerable agricultural land at Camp Pendleton is not irrigated because of insufficiency of water, merely reflects legal limitations upon the Government's riparian rights—the United States may not, under riparian claim, store water or use water on nonriparian land. Appropriators, not being subject to such limitations, are often able to make lawful use of water resources which are not available to riparian owners. That is the situation in this case. (4) True, some of the 28,000 acre feet average waste to the ocean will be stored in the Vail Reservoir under appropriative rights which are prior to those of the Santa Margarita Mutual Water Company or the Fallbrook Public Utility District. However, the record since Vail Reservoir was built shows that much water can still be obtained by further storage. For example, in the water year 1951-1952, there was a discharge to the ocean of 49,483 acre-feet.[7] This, and the losses of other years, must be conserved in this semi-arid region where water is its treasure.

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[7]Plaintiff's Exhibit 44; Appellants' Opening Brief, Appendix "B".

II.

Replying to Appellee's Charge That Numerous Inaccuracies Are Presented to the Court by Amicus.

(a) Regarding Appellee's Right to Impound Water.

We are glad to have Appellee state to this Court "The United States of America claims no right to impound riparian water."[8] We hope that this Court will include such a pronouncement in its decision.

The trial court, faced with Plaintiff's testimony that it could not secure from the river or its underground basins the amount of water for which it was asking an award without a dam to impound flood waters and so artificially augment the available supply,[9] did sanction the Government's plan for storing flood waters "temporarily" in a surface reservoir and thereafter transferring same to its underground reservoir basins for future use. Appellee may be technically correct in saying the Decree does not expressly award a right to the United States to store riparian water but the decree of necessity contemplates the use of a so-called equalizing reservoir at the De Luz site without which the trial court found[10] the quantities of water awarded to the Government could not possibly be secured from the river, all as we pointed out in our *Amicus Curiae* brief.

While the decree does not so state, Appellee claimed in the Court below that this "impounding" is to be done under a claim of riparian right.[11] As we pointed out in our first brief, this is an ingenious device to store water for future use by dividing the process into two stages,

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[8]Page 27. Appellee's Reply Brief to *Amicus*.

[9]See discussion of dam, in *Amicus Curiae* Brief, pages 43-48.

[10]109 Fed. Supp. 28, 41.

[11]R. 480-481, 506-507, 622-623.

the first in a surface reservoir, the second in an underground reservoir. This is without legal justification. Of course, the Navy can acquire a storage right by completing its Application No. 12576 to appropriate and store the waters of the River now pending before the State Division of Water Resources.

Even if the proposed plan were to be considered a water-spreading project, it still would be outside its riparian rights and under California law would constitute the exercise of an appropriative right. California Water Code, Division 2, Part 2, under the heading "Appropriation of Water" Section 1242 provides:

> "The storing of water underground, including the diversion of streams and the flowing of water on lands necessary to the accomplishment of such storage, constitutes a beneficial use of water if the water so stored is thereafter applied to the beneficial purposes for which the appropriation for storage was made."

The rules of the Division provide for the making of an application for such projects as is proposed by the Government.

It makes no difference that the storage in the Government's proposed surface reservoir may be for only short periods of time and may not technically amount to seasonal storage. In *Moore v. California Oregon Power Co.,* 22 Cal. 2d 725, 140 P. 2d 798, cited in Appellants' Opening Brief, the California Supreme Court refused to recognize a riparian right to store water for periods as short as a day or even less than a day. The Court declared that the principle applicable to the prohibition against seasonal storage by riparians is equally applicable to short-term storage. (22 Cal. 2d at 735, 140 P. 2d at 804.)

Since the proposed dam for the impounding of flood waters cannot come within any possible prescriptive claim and since Appellee now disclaims any appropriative right for this particular purpose,[12] we respectfully request this Court to declare that no right to impound water is now inherent in the United States as the owner of Rancho Santa Margarita.

(b) Regarding Appellee's Right to Use Riparian Water on Non-riparian Land for Military Purposes.

The trial court found and concluded that:

> "The past and present diversion of water by the United States of America from the Santa Margarita River, as disclosed in the preceding findings, has been a reasonable exercise under the laws of the State of California *of its riparian rights.*"[13] (Emphasis added.)

The "preceding findings" referred to above include Finding 66, which is:

> "In addition to the water distributed for agricultural (irrigation) purposes on Stuart Mesa and South Coast Mesa outside of the watershed, practically all of the water delivered for military use by the distribution system is delivered outside of the watershed, including Areas 11, 12, 13, 14, 15, 16 and 17, as well as Camp Del Mar."[14]

Therefore when the Judgment in paragraph 10 awarded to Appellee, as its present water need, 11,000 acre feet per year, and for its future needs 23,500 acre feet per year, and in paragraph 16 decreed that the United States' "rights to the use of water hereinabove described" be

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[12]Appellee's Reply to *Amicus,* pages 27, 43-44.

[13]110 Fed. Supp. 767, 786, No. 19 Conclusions of Law.

[14]110 Fed. Supp. 767, 778, Finding No. 66.

quieted against the Appellants "and all parties claiming under them," the trial court, contrary to the assertion of Appellee at page 27 of its Brief, did decree that *the United States for military purposes could use its riparian water on non-riparian land* as it had theretofore been doing.

However, we gladly accept Appellee's declaration that "the United States of America does not claim a right to use riparian water on nonriparian land" and respectfully request that the disavowal be made official and binding by this Court including an appropriate declaration to that effect in its decision.

(c) Regarding Appellee's Defense of That Portion of the Judgment Which Declares That Military Use Is a Riparian Use and Exercised to the Extent Necessary in Substitution of the Agricultural Use.[15]

In reply to our criticism of the "Substitute Use" theory adopted by the trial court[16] holding that the Government was entitled to use for military purposes "the maximum agricultural use to which the United States would be entitled under its riparian rights" if its riparian lands were used for agriculture (quoting from the actual provisions of the Judgment entered herein February 25, 1953[17]), Appellee attempts to answer this criticism merely by quoting from the prior decision of the trial court announcing its determination and directing preparation of Findings and Judgment in accordance therewith.[18] Appellee then declares "the decision of the Trial Court is in full conformity with California law." Appellee seems

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[15]Appellee's Reply Brief to *Amicus*, page 28.
[16]See *Amicus* Brief, pages 7-10.
[17]110 Fed. Supp. 767, 787, 788.
[18]109 Fed. Supp. 28, 37.

to think the truth of its assertion is self evident since it cites no authority. We are uncertain what point is attempted to be made. It appears to conflict with its prior disclaimer that the United States does not claim a right to use riparian water on non-riparian land, since its military uses admittedly are practically all on non-riparian land.[19]

(d) Regarding United States Rights to the Use of Water for Military Purposes.

This appears to be a continuation of (c) and in the same general vein. The Government was awarded very large quantities of Santa Margarita River water for military purposes. As we have seen, most of the military uses are outside the watershed and on non-riparian lands. Appellee first makes the technical objection that no appeal was taken on this point. However, there is ample basis to be found in paragraphs 3, 4, and 5 of the "Statement of Points on which Appellants intend to Rely on Appeal"[20] to justify our pointing out this error. Appellee then erroneously declares that " 'reasonableness' is the *sole* criterion in regard to the use of riparian water"[21] (Emphasis added) but fails to cite any authority for its statement. The truth is that "reasonableness" is only *one* of the criteria. Since the adoption of the 1928 Constitutional amendment "reasonable use" like "beneficial use" is a measuring stick for riparian rights as well as *all* other rights to the use of water in California. It does not follow, however, that the converse is true and that all reasonable beneficial uses are riparian uses. All stallions may be horses but all horses are not stallions.

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[19]Appellee's Brief, page 25; Finding 66, 110 Fed. Supp. 767, 778.
[20]R. 96.
[21]Appellee's Reply to *Amicus* Brief, page 29.

Appellee either mistakes or misstates Amicus' position when it says we challenge the right of the United States to use water for agricultural purposes. What we pointed out in our brief[22] was that the judge's adoption of the "Substitute use" theory (*i. e.,* allowing the United States to use the same quantity of water for military purposes as it might have used for agricultural purposes) *has no basis in fact* since the United States has never discontinued any of the uses of water for agricultural and livestock purposes or pretended to transfer such uses to military purposes. It is undisputed that the agricultural uses have continued as before and the heavy military uses added as a new burden imposed on the river; also that the water for military uses is principally on lands outside the watershed. Appellee's reply doesn't pretend to answer this serious objection.

(e) Regarding the Incorrect Statement That California Law Does Not Contemplate the Filing of an Application to Appropriate Water for Military Purposes.

While it is true that applications to appropriate water for military purposes are not usual or common, because military camps are not numerous, it is not true that the laws of California do not authorize the receiving and processing of applications covering uses practiced at military establishments. The complete answer to such suggestion is that the State Division of Water Resources has already done so in this very case, having received and filed on June 30, 1948, the application of the Navy to appropriate 165,000 acre feet of water per annum from the Santa Margarita River for use at Camp Pendleton, all as shown by Defendant's Exhibit "K" admitted in evidence in this case.

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[22] *Amicus Curiae* Brief, pages 7-10.

Appellee next goes outside the record to speculate on how other military establishments in California get their water and suggests "that it is not the policy of the State of California to attempt to deprive them of that water."[23] First, let it be noted that the State of California is not and has not attempted to deprive Camp Pendleton of water but has been and now is willing to cooperate and help it get its water in a legal manner and in accordance with the laws of the State. Secondly, Appellee could have told the Court, without any speculation whatever, that at certain other military establishments in California such as El Toro Air Base in Orange County and at March Field in Riverside County, it is not the policy of the Federal agencies there to attempt to deprive the local people of their local supply but instead they have contracted with the Metropolitan Water District to supply their requirements with Colorado River water. Also that the Navy has had before it for some time an offer from the Metropolitan Water District for similar service of supplying Camp Pendleton with Colorado River water, which offer is still open to acceptance.

Appellee again asserts that it makes "no claim that it may utilize riparian water on nonriparian land" and adds: "The Court . . . does not award to the United States any such right."[24]

We insist that the judgment does just exactly what the Appellee here disclaims and for that reason the Appellee eagerly wants it affirmed as is. We fear Appellee wants a wide no man's land or a twilight zone in which it can maneuver to later take advantage of every vague expression and uncertain word found in it.

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[23]Appellee's Reply Brief to *Amicus,* page 31.

[24]Appellee's Reply Brief to *Amicus,* page 31.

Therefore if Appellee means to be bound by the full import of its words it should join us in respectfully requesting this Court to spell out Appellee's disclaimer in its decision with such particularity that no uncertainty or controversy over what the United States claims and what its rights are can hereafter ever arise.

(f) Regarding Appellee's Claim of Prescriptive Rights.

Appellee is a self accuser in imputing to us the accusation that "in some manner the United States of America seeks to mislead this Court."[25] Counsel cannot be easy in mind while continuing to urge upon this Court the *Larsen* case as supporting their claim of prescriptive rights. It is untrue that *Amicus'* and Appellants' only answer to the *Larsen* case was "that it is contrary to the general rule adhered to in that State." What Appellants did say was "*Appellee's interpretation* of *Larsen v. Apollonio,* 5 Cal. 2d 440, 55 P. 2d 196 (1936) . . . would throw that decision out of line with numerous other decisions of the California courts," and that "*Dykzeul v. Mansur,* 65 Cal. App. 2d 503, 150 P. 2d 958 (1944), which appellee also cites as support for its theory . . . clearly involved a diversion and trespass upon land belonging to another person, *just as the Larsen Case did.*"[26] (Emphasis added.)

At pages 48-53 of their opening brief, Appellants had called Appellee's attention to the undisputed facts on which the *Larsen* decision was based, which were that plaintiff's diversion had originally been made on a large tract of land owned by defendant's predecessor of which defendant's land was then a part. The diversion therefore

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[25]Appellee's Reply Brief to *Amicus,* page 32.

[26]Appellants' Reply Brief, pages 29-30.

constituted an actual invasion of defendant's predecessor's rights which, having been persisted in for the statutory period without legal action or objection, gave plaintiff a prescriptive right. Appellants then closed their discussion with the declaration, "We respectfully submit that the *Larsen* case is not in conflict with the cases on which we rely."[27] Appellee had ample time to verify the facts in the *Larsen* case from the record in that case, and we insist that it was its duty to have done so.

(g) Regarding the Stipulated Judgment Between the Vails and the Predecessor of the United States.

Appellee here seeks unjustifiably to invoke the technicality that no appeal was taken from the Court's declaration in regard to the Stipulated Judgment between the United States and the Vails. Ample basis is to be found in paragraphs 15 and 17 of the "Statement of Points on which Appellants intend to Rely on Appeal"[28] to justify our complaining of and presenting arguments at pages 29-32 of *Amicus* Brief against the use of this Stipulated Judgment in the separate trials of Appellants, who were not parties thereto. Nowhere either in its Reply Brief to Appellants or its Reply Brief to *Amicus* does Appellee give any reason or cite any authority warranting the injection of the Stipulated Judgment into the trials in the Court below. Finally in its Reply to Amicus, Appellee abandons any claim to any "[1] . . . right to utilize riparian water on nonriparian land as provided by the Stipulated Judgment; [2] claims no right to store riparian water."[29] However, Appellee does continue to claim "the three (3) cubic feet per second which the Vail Estate

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[27]Appellants' Opening Brief, page 53.

[28]R. 99.

[29]Appellee's Reply Brief to *Amicus Curiae,* page 35.

delivers to the United States of America pursuant to the Stipulated Judgment."[30] We pass over, for the purposes of this argument, the incorrect statement that the three cubic feet per second are delivered *"to the United States of America"* when the Stipulated Judgment merely provides that the Vails shall "cause to be maintained at Gaging Station No. Three (3) a constant flow of water of not less than three (3) cubic feet per second."[31] However, it seems to us that if for any reason the attempted grant by the Vails to the owners of Rancho Santa Margarita of rights of storage and use of water on non-riparian lands was not effective as against Appellants, as Appellee now concedes, *for the very same reason* the third claimed benefit under the Stipulated Judgment of "a constant flow of water of not less than three (3) cubic feet per second" would also be ineffective. Appellee cites no authority and offers no explanation how this anomaly can be. We know of none.

(h) Regarding the United States-California Stipulation.

We contended in the *Amicus* brief that the Stipulation contained enough uncertainties to justify this Court passing on its true meaning and we asked that it be given the same interpretation put on it by the officials who wrote it in statements made by them (just before and just after its execution) in their testimony before Congressional Committees and when presenting their view through the medium of the Congressional Record.[32] Appellee complains that the quotations used by us were "stripped from con-

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[30]Appellee's Reply Brief to *Amicus Curiae,* page 35.

[31]R. page 29. Note: Gaging Station No. 3 is 6 or 7 miles upstream from Rancho Santa Margarita, with numerous intervening land owners. [See R. 22.]

[32]*Amicus* Brief, pages 32-43.

text" but it suggests no additional language used at the time which would in any way modify or change the meaning of the clear-cut statements quoted in our Brief.

It is not true that the "single question" before the Congressional hearing concerned the term "paramount." In most instances, as the quotations printed in the *Amicus* Brief[33] clearly show, the questions and answers also embraced declarations that California State water laws should measure and limit the rights of the United States and that the Federal Government would claim no water by reason of its sovereignty, *i. e.,* "the powers of the National Government under its Constitution,"[34] but only as a landowner. We, of course, realize that no mere functionary of the Government can give away its property or property rights but since the attorneys quoted were the same ones who drafted the Plaintiff's complaint and were in charge of its prosecution, we assumed they had a right to and could interpret its language and define the issues of that cause of action. However, we believe that it is now settled, Stipulation or no Stipulation, that State laws control and regulate *the use of water* on non-navigable streams within the boundaries of each State. Furthermore, we are satisfied that under the facts of this case and under the laws of California the United States cannot claim a prescriptive right either for storage or for use out of the watershed. Neither is there anything in Appellee's brief or in the record to exempt the United States

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[33]*Amicus* Brief, pages 36-42.

[34]This is the claim made by Appellee at page 87 of its Reply Brief to Appellants which prompted our accusation, especially as it was followed on the same page with the further statement: "The state law would have no bearing upon the activities of the United States of America within the area and over the rights to the use of water which are here involved."

from complying with the California water laws governing the making of appropriations, since the testimony regarding diversions and use out of the watershed relates solely to acts and happenings occurring after the 1913 Water Commission law went into effect.[35] Anyway the United States, acting through the Navy, has already submitted itself to the State laws governing appropriations by filing on June 30, 1948, its Application No. 12576 to appropriate 165,000 acre feet of water per annum of the Santa Margarita River,[36] and has waived any claim which it might have had that these State laws do not apply to the Federal Government.

(i) Regarding Judgment Conflicting or Interfering With the Proper Functions of the State of California.

Appellee recites a single sentence out of context from Paragraph 15 of the judgment and ends its discussion of that particular feature of the judgment by saying: "There is thus disclosed that in actual practice this litigation [meaning the judgment] has not interfered with the State proceeding to perform its functions."[37]

Appellee omitted the pertinent part of the paragraph of the judgment from which it quoted, which says: ". . . injunction against further prosecution of the application [of the Santa Margarita Mutual Water Company] is not necessary. A declaration of right will suffice."[38] Furthermore, the paragraph immediately follow-

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[35]See Appellants' Reply Brief, pages 30 *et seq.*, and *Amicus Curiae* Brief, pages 25-26.

[36]Defendant's Exhibit "K".

[37]Appellee's Reply to *Amicus*, page 40.

[38]110 Fed. Supp. 767, 788, Paragraph 15 of Judgment.

ing imposes a blanket injunction on the State of California as follows:

> "It is further ordered, adjudged and decreed that the rights, title, and interest of the United States in and to the rights to the use of water hereinabove described are quieted as against the adverse claims of the defendant Santa Margarita Mutual Water Company and the Defendant in Intervention the State of California, and all parties claiming under them; and *they and each of them are forever barred from any and all claim of right, title or interest in and to those rights to the use of water.*"[39]

Certainly the State of California, faced with the foregoing, is unlikely to act upon or issue any further permits on the Santa Margarita River. The judgment constitutes a moral barrier if not a legal one.

(j) Regarding "Average Annual Flow."

Under the above heading Appellee berates us for failing to appreciate the award the trial court made to the United States as its riparian rights in the River by the Judgment entered herein. Appellee proudly declares: "Those rights were decreed by the Court to be in the aggregate of 69,237 acre-feet per year." Admittedly the total normal annual water crop of the entire river is only around 36,000 acre feet. It seems truly remarkable therefore that Appellee claims under the award twice the average flow or 69,237 acre feet—and that amount for just *one* riparian owner. But, this 69,237 acre feet per year, so Appellee says, was awarded to it as its *riparian rights* only. To that figure must be added, if we accept Appel-

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[39]110 Fed. Supp. 767, 788, Paragraph 16 of Judgment.

lee's contentions elsewhere in its brief, its *prescriptive rights,* which the trial court found were "4,806 acre-feet used on irrigated lands outside the watershed which *the United States has acquired the right to use by prescription.*" And the trial court also has found: "In addition *the United States of America has acquired by prescription* the right to divert and impound annually in Lake O'Neill 4,300 acre-feet of water."[40] (Emphasis added.)

Only a "mathematical mirage," to use an expression coined by Appellee, could produce such fantastic results. We think such unrealistic findings were the logical result of the unnatural procedure adopted in this case of trying piecemeal and separately the claims of individual defendants where a comprehensive adjudication of the water rights of the entire watershed was called for by the pleadings.

Again Appellee seeks to avoid a decision on the merits of *Amicus'* arguments by claiming that technically Appellants did not reserve errors. The principal contention of *Amicus* at pages 43-48 of its brief was that the trial court sanctioned the "equalizing" or averaging of the flow of the River by storage and thus artificially increased the amount of water the United States could divert under its riparian right. We believe that paragraph 7 of Appellants' Statement of Points on Appeal,[41] reasonably interpreted, justifies *Amicus* presenting the objections and arguments it did.

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[40]110 Fed. Supp. 767, 788, Paragraph 10 of Judgment.
[41]R. 97.

(k) Regarding 27,983 Acre Feet of Water Which Has Annually Wasted Into the Ocean, Being 75% of the Total Average Resources of the River.

Appellee's answer to this immense wastage of precious water is that the trial court found there was no surplus, but this Court is not bound by such a finding in the face of the undisputed evidence supplied by the Government's own witnesses. The claim of Appellee to practically all the water in the river is based on a claimed need to:

(1) recharge the subterranean basin.
(2) repel salt water intrusion.
(3) maintain the level in the basin to subirrigate wild grass.

The wastage of 75% of the total resources of a river to accomplish the foregoing results is contrary to the public policy of the State of California unless absolutely necessary to protect the rights of the riparian owner. As was pointed out in the Brief of *Amicus,* pages 48-56, the salt water intrusion in 2 wells near the ocean was the result of appellee's excessive pumping and exportation out of the watershed, there being at all times a source of water available to the appellee in the two upper basins, which have a combined capacity of approximately 40,000 acre feet.[42] The claim of need for maintaining high water tables sufficient to subirrigate wild grass would forbid the reasonable use of the basins since any substantial pumping therefrom would lower the water table in ordinary years below the roots of wild grass. Appellee's own witnesses named 100 feet below the ground surface as a depth to which the middle and upper basins could be reasonably

[42]R. 290-291, 315-316.

and safely drawn down. The Government's own records show that the water table in these 2 basins has never been lowered to even one-fifth (1/5) that depth during the period of claimed critical water shortage. Plaintiff's Exhibit 11 shows the water level profile in October, 1951, after two of the driest years of record with no water reaching the ocean; in the middle or Chappo Basin the water level was less than 25 feet below the ground level while in the upper or O'Neill Basin the water level was less than 15 feet.

(1) Regarding Existence of Surplus Water in Santa Margarita River Available for Appropriation.

Appellee complains that the Navy's application to the State to appropriate 165,000 acre feet of water filed June 30, 1948, is not before the Court. It is before the Court *as evidence* in the case, being Defendant's Exhibit "K." Of course no appeal was taken from it because itself it was not an issue. Of course no one objects to the Navy making its application. In fact we think the Navy did just what it should have done. But Appellee is now here saying that the Navy had these appropriative rights all the time, under a claim of *"de facto"* or "non-statutory" appropriation. We ask this Court to note the fact that the Navy in making this application showed that it did not think it had appropriative rights in 1948 as we have pointed out in our Brief at pages 25-28. This is not a case of an appropriation made on public lands or one made on private lands prior to the time the public domain upstream passed into private ownership. Under those circumstances the cases hold that a subsequent entryman took his patent and title encumbered with the diversions and water uses theretofore established. There has been no reason presented to this Court why the California Water

Commission Act of 1913 should not be applicable to the Government's claim of appropriation in view of the facts in this case and the written stipulation between the United States and California that the State laws should measure the rights of the United States of America to the use of water.

(m) Regarding Burden of Proof, Judge Views the Premises and Threat to Military Establishments if Decision Is Adverse to the United States.

Amicus has already explained its views on the above subjects which it is not necessary to repeat here.

Appellee has injected considerable confusion in its discussion by constantly asserting that there is an insufficient supply in the River to meet the riparian demands, therefore there cannot exist any surplus subject to appropriation.

We believe it important to point out that there well may be an admitted shortage in the "normal" flow of the River to meet the riparian requirements and yet exist a surplus in the River available for appropriation. This frequently occurs because riparians may not store water in the season of heavy rain and runoff for use in the dry season of no runoff. A deficiency in the supply available to riparians occurs nearly every year on streams of intermittent flow. In the season of heavy winter rains when the runoff exists, the farmer has few crops to irrigate and the requirements of those he has are largely met by the same rains that produce the runoff in the stream channel. In the late Spring and Summer when crops need to be irrigated the runoff has ceased and riparians are faced with a seasonal shortage. The runoff of the winter rains which the riparian farmer has

little need for at that season of the year and which he may not store under a riparian right, thereby become the surplus which the appropriator may store for future use to avoid it wasting into the ocean. And that is what has frequently happened on the Santa Margarita River according to the records in this case.

Therefore Appellee's frequent reference in its brief to the "meager supply of water in the Santa Margarita River inadequate to meet the riparian demands," did not refer to or include in that description of the riparian's water supply the great floods listed in the judge's decision, most of which reached the ocean unused. We listed some of these flashfloods in our brief at page 44.[43]

Regarding Allen v. California Water and Telephone Company, Cited by Appellee.

It is true that in the case of *Allen v. California Water and Telephone Company,* 29 Cal. 2d 466, 176 P. 2d 8 (1946), relied on by Appellee and cited at pages 19 and 45 of its Brief, there existed a threat of salt water intrusion to an underground basin as there does in this case, but the California Supreme Court in the *Allen* case did not allow the riparians to claim the surface flow of the river for the purpose of forcing a small part of the water into the underground basin to maintain a fresh water barrier and the rest to waste into the ocean. On the contrary, it adopted a physical solution to prevent the wastage of so much precious water and provided that the appropriator could take and divert upstream the equivalent amount of water which would otherwise waste into the sea. The California Supreme Court added language

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[43]For a fuller list, see trial Judge's decision reported in 109 Fed. Supp. 28, 40-41.

of its own to the decree of the lower court and as modified affirmed the judgment. Paragraph VII A, which was added to the decree in that case, was as follows:

> "Defendant and cross-complainant, California Water & Telephone Company may operate its pumping plants and pump water from its wells on its land in the Tia Juana Valley and export that water for use by its customers when surface river waters are flowing in the bed of the Tia Juana River and which surface waters, if not intercepted by such pumping operations, would waste into the ocean."[44]

That is substantially what we are urging should be done in this case. Here 75% of the water resources of the river have, on the average, been lost into the ocean in a semi-arid region crying for this very water. In the language of the *Allen* case we ask that Fallbrook Public Utility District, the appropriator, be allowed to divert for storage and use by Fallbrook residents when surface river waters are flowing in the bed of the river and which surface waters if not intercepted by such storage and diversion would waste into the ocean.

Conclusion.

In conclusion it must be said that as a result of Appellee's latest Brief in Reply to our brief, the widespread gap between the original contentions of the respective parties has been substantially narrowed and the number of issues greatly reduced. This action started with the Government advancing every possible legal justification in support of its then and past uses and practices, claiming the greatest possible amount of water and the great-

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[44] *Allen v. California Water & Telephone Co.*, 29 Cal. 2d 466, 491, 176 P. 2d 8, 23.

est freedom of action as to the area in which it might use the water. We congratulate Appellee in abandoning some of its less tenable contentions.

1. As we read its Brief in Reply to *Amicus,* Appellee no longer claims[45] as valid that portion of the decision which declares:

> "The past and present diversion of water by the United States of America from the Santa Margarita River, as disclosed in the preceding findings, has been a reasonable exercise under the laws of the State of California *of its riparian rights.*"[46] (Emphasis added.)

It having already been conceded by Appellee, and found by the trial court, that "practically all of the water pumped for military purposes is delivered outside of the watershed,"[47] Appellee's disavowal that the United States claims any right to use riparian water on non-riparian land leaves the above quoted portion of the decision confessedly without support.

2. As we read Appellee's latest Brief, it disavows any claim of any right, (1) to store water; or (2) to use water outside of the watershed *by virtue of the Vail Stipulated Judgment*[48] although at page 19 of its first Brief it had listed among its claimed benefits:

> "c. Rights to Use Water Under the Stipulated Judgment Outside of the Watershed; Right to impound."

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[45]Appellee's Reply to Brief of *Amicus,* pages 27 and 31.

[46]Conclusion of Law No. 19, 110 Fed. Supp. 767, 786.

[47]Appellee's Brief, page 25; see Trial Court's Finding No. 66, 110 Fed. Supp. 767, 778.

[48]Appellee's Reply to Brief of *Amicus,* page 35.

We appreciate Appellee's present disclaimer of any of those rights under the Stipulated Judgment as an aid to the clarification of the issues. However, we believe it will be necessary for this Court to indicate proper qualifications and limitations on No. 23 of the Conclusions of Law which declares:

> "Each and every right to the use of water of the United States of America in the Santa Margarita River, *including* but not limited to *the rights contained in the Stipulated Judgment,* Exhibit A of the Complaint, are prior and paramount to the rights claimed in that stream by the Santa Margarita Mutual Water Company."[49] (Emphasis added.)

Since it is now conceded that the Stipulated Judgment binds only the parties thereto and their privies, the attempt to vest the Government with the rights specified in the Stipulated Judgment as against defendants who were not parties thereto, can be of no force or effect. However, Appellee continues to claim as valid one portion which provides for a continuous flow in the River of three cubic feet per second. It cites no authority for validating one inseparable provision from the rest of the judgment. We know of none.

3. Appellee still claims prescriptive rights to store water in Lake O'Neill (4,300 acre feet) and to divert water out of the watershed for use on the Stuart and South Coast Mesas. We are confident, however, that both the facts and the law are against such claim.

4. Appellee appears to be still claiming a "non-statutory" appropriation, but all the evidence in the case shows that the diversions and uses were after the adop-

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[49]110 Fed. Supp. 767, 787.

tion by the State of its Water Commission Act in 1913 requiring all appropriations to be initiated by the filing of a written application with the proper State official. The Stipulation between the United States and the State of California specifies that State law should govern and the case was tried by all parties on that basis. We think even without the Stipulation, State law controls in these matters.

It follows from the foregoing that the Judgment must be reversed.

November 26, 1954.

Respectfully submitted,

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